United Nations A/CN.9/611

General Assembly

Distr.: Limited
16 May 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Security Interests

Draft Legislative Guide on Secured Transactions

Security rights in receivables

Note by the Secretariat*

Contents

Page

Security rights in receivables 2

* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to include changes decided at the tenth session of the Working Group held in New York from 1 to 5 May 2006.

V.06-54134 (E) 060606 060606

Security rights in receivables

[*Note to the Commission: In the context of its discussion on security rights in receivables, the Commission may wish to consider the definitions (a) ("security right"), (d) ("secured creditor"), (f) ("grantor"), (p) ("receivable"), (q) ("assignment"), (r) ("assignor"), (s) ("assignee"), (t) ("subsequent assignment"), (u) ("debtor of the receivable"), (v) ("notification of the assignment") and (w) ("original contract") (see A/CN.9/WG.VI/WP.27/Add.1).*]

Parties, security rights, secured obligations and assets covered

3. In particular, the law should provide that it applies to:

(d) All types of movable assets and attachments, tangible or intangible, present or future, not specifically excluded in the law, including inventory, equipment and other goods, contractual and non-contractual receivables, contractual non-monetary obligations, negotiable instruments, negotiable documents, rights to payment of funds credited to bank accounts, proceeds under independent undertakings, and intellectual property rights;

[*Note to the Commission: As to non-contractual receivables, the Commission may wish to refer to the note after definition (p) ("receivable") in A.CN.9/WG.VI/WP.27/Add.1. As to contractual non-monetary obligations, the Commission may wish to note that the commentary will explain that the general recommendations apply to contractual non-monetary obligations. The commentary will also explain that general law other than the law recommended in the draft Guide applies to the rights of obligors of contractual non-monetary obligations.*]

...

(f) Generally, outright transfers of receivables;

[*Note to the Commission: The Commission may wish to note that, as the definition of "receivable" excludes rights to payment under a negotiable instrument, the obligation to pay under an independent undertaking and the obligation of a bank to pay funds credited to a bank account, recommendation 3 (f) does not apply to an outright transfer of a negotiable instrument, proceeds under an independent undertaking or a right to payment of funds credited to a bank account. However, the recommendations apply to transfers of such assets for security purposes, as they are treated as secured transactions. For example, the transfer for security purposes of a right to payment of funds credited to a bank account is covered as a method of achieving control (see definition of "control" in A/CN.9/WG.VI/WP.27/Add.1, para. 21 (ee) and (gg)). The commentary will explain that outright transfers of negotiable instruments, proceeds under an independent undertaking and funds credited to a bank account have been excluded as: (i) they raise different issues and would require special rules, (ii) unlike receivables in which a security transfer and an outright transfer would compete for priority based on the order of registration, with respect to negotiable instruments a secured creditor could always obtain a superior right by taking possession of the instrument, while, in the case of proceeds under an independent undertaking and funds credited to a bank account, a secured creditor could obtain a superior right by control. The commentary will also discuss issues arising in outright transfers of negotiable*

instruments other than cheques for the benefit of States that may wish to address them in the law.]

4. Except to the limited extent provided in recommendations 16 and 37 relating to a personal or property right that secures a receivable, negotiable instrument or other obligation that is within the scope of the Guide, the law should not apply to security rights in [*see A/CN.9/WG.VI/WP.26/Add.7*].

Creation of a security right in receivables

[*Note to the Commission: The Commission may wish to note that the commentary will explain that the general recommendations apply unless modified by asset-specific recommendations.*]

Assets and obligations subject to a security agreement

13. The law should provide that a security right may secure all types of obligation, including future, conditional and fluctuating obligations. It should also provide that a security right may be given in all types of asset, including parts of assets and undivided interests in assets and assets which, at the time of the security agreement, the grantor may not yet own or have the power to dispose of, or which may not yet exist, as well as in proceeds. Any exceptions to these rules should be limited and described clearly in the law.

Effectiveness of a bulk assignment and an assignment of future, parts of and undivided interests in receivables

14. The law should provide that:

(a) The assignment of receivables that are not specifically identified, future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee and as against the debtor of the receivable, as long as, at the time of the assignment or, in the case of future receivables, at the time they arise, they can be identified to the assignment to which they relate; and

(b) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable. [*See article 8 of the United Nations Assignment Convention.*]

Effectiveness of an assignment made despite an anti-assignment clause

15. The law should provide that:

(a) An assignment is effective as between the assignor and the assignee and as against the debtor of the receivable notwithstanding an agreement between the initial or any subsequent assignor and the debtor of the receivable or any subsequent assignee limiting in any way the assignor's right to assign its receivables;

[*Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 15 (a) makes ineffective only an agreement between an obligor and an obligee that limits the obligee's right to assign a receivable owed by the obligor to the obligee. If such a receivable is assigned, the obligor is the "debtor of the receivable" and the obligee is the "assignor".*

For example, if an agreement for the lease of goods limits the lessor's right to assign the rents due to it under the lease, recommendation 15 (a) makes the limitation on assignment ineffective, because the agreement is between the obligor (the lessee) and the obligee (the lessor) of the receivable (the rent arising from the lease agreement). By way of contrast, if the lease agreement between the lessor and the lessee limits the lessee's right to assign a receivable consisting of the lessee's claim to rents due to the lessee from the sublessee under a sublease, recommendation 15 (a) has no application, and nothing in this Guide makes the limitation ineffective. That is because the agreement limiting the right of the lessee to assign its claim for rents due to it from the sublessee under the sublease is not an agreement between the lessee (sublessor and obligee in a sublease) and the sublessee (obligor in the sublease). Whether the limitation in the lease is enforceable against the lessee would be determined by the law other than the law recommended in this Guide.

The same analysis would apply if the restriction on transfer was contained in a licence of intellectual property. Recommendation 15 (a) would render ineffective a term in the licence agreement that restricted the licensor from assigning fees due from the licensee. However, it would not render ineffective a term in the licence agreement restricting the licensee from assigning sublicence fees. Whether the latter term would be effective would be determined by law other than that recommended in the draft Guide.]

(b) If other law creates any obligation or liability of the assignor for breach of such an agreement, the other party to such an agreement may not avoid the contract from which the assigned receivables arise or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement;

(c) This recommendation applies only to assignments of receivables:

(i) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(ii) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(iii) Representing the payment obligation for a credit card transaction;

(iv) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[*Note to the Commission: The Commission may wish to note that the commentary will clarify that contract avoidance referred to in paragraph (b) means contract termination in general.*]

Creation of a security right in a right that secures an assigned receivable, a negotiable instrument or any other obligation

16. The law should provide that:

(a) A security right in a receivable, a negotiable instrument or any other obligation covered as an encumbered asset by this law automatically extends, without further action by either the grantor or the secured creditor, to any personal

or property right that secures payment or performance of the receivable, negotiable instrument or other obligation;

(b) If the personal or property right is an independent undertaking, the security right automatically extends to the proceeds under the independent undertaking but does not extend to the right to draw under the independent undertaking;

(c) This recommendation does not apply to a right in immovable property that under law other than this law is transferable separately from a receivable, negotiable instrument or other obligation that it may secure;

(d) A security right is created under paragraph (a) of this recommendation in any personal or property right securing payment of a receivable, negotiable instrument or other obligation notwithstanding any agreement between the grantor and the debtor of the receivable or the obligor of the negotiable instrument or other obligation limiting in any way the grantor's right to create a security right in the receivable, negotiable instrument or other obligation, or in any personal or property right securing the receivable, negotiable instrument or other obligation;

(e) If other law creates any obligation or liability of the grantor for breach of the agreement mentioned in paragraph (d) of this recommendation, the other party to such an agreement may not avoid the contract from which the receivable, negotiable instrument or other obligation arise, or the security agreement creating the personal or property security right on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement;

(f) Paragraphs (d) and (e) of this recommendation apply only to security rights in receivables, negotiable instruments or other obligations:

(i) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;

(ii) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(iii) Representing the payment obligation for a credit card transaction;

(iv) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

(g) The creation of a security right in a possessory property right under paragraph (a) of this recommendation does not affect any obligations of the grantor to the debtor of the receivable or the obligor of the negotiable instrument or other obligation with respect to the relevant property existing under the law governing that property right;

(h) To the extent that the automatic creation under paragraph (a) of this recommendation and the automatic third-party effectiveness under recommendation 37 of a security right in any personal or property security right securing payment of a receivable, negotiable instrument or other obligation is not impaired, this recommendation does not affect any requirement under law other than this law relating to the form or registration of the creation of security rights in any

assets, securing payment of a receivable, negotiable instrument or other obligation, that are outside the scope of this law.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that the purpose of recommendation 16 is to facilitate financing transactions, such as securitizations of pools of loans secured by security rights in movables and immovables. In these cases the buyer of the loans will want to be able to look to the security rights securing the loans but would not want to incur, at the outset of the purchase, the additional expense of a separate act of transfer (if required under law other than the law recommended in the draft Guide) for each loan in the pool of loans, that could number in the hundreds or thousands. Separate acts of transfer, if any, would be necessary (if required under other law) to enforce only those loans that are later in default, typically a small proportion of the loans in the pool actually purchased. The buyer could decide whether to accept the expense of separate acts of transfer at the time of enforcement, whether voluntarily from the seller or with the assistance of a court. But, in deciding whether to purchase the loans and at what price, the buyer would take into account the expense of separate acts of transfer only for the small portion of the loans expected to be in default, not for the entire pool of loans. As a result of the expense savings, the seller should be able to obtain a higher purchase price, thereby making more funds available to the seller.*

The commentary will also make it clear that recommendation 16 applies to outright transfers of receivables (but not of negotiable instruments or other obligations) as the draft Guide generally applies only to outright transfers of receivables.

The commentary will also clarify that paragraphs (a) to (c) track the language of article 10 (1) of the United Nations Assignment Convention with appropriate adjustments necessary in view of the nature of the law in the draft Guide as domestic law, while paragraphs (d) to (f) track the language of recommendation 15 and article 10 (2) to (4) of the United Nations Assignment Convention.

In addition, the commentary will clarify that paragraph (g) tracks the language of article 10 (5) of the United Nations Assignment Convention, according to which, if the security right involves the delivery of possession of an asset and such delivery causes damage to the debtor of the receivable or the obligor of the negotiable instrument or other obligation, any liability that may exist under law applicable outside the law recommended in the draft Guide is not affected. This may arise, for example, in the case of a delivery of possession of an item of valuable tangible property if the secured creditor or transferee damages or loses the property.

Furthermore, the commentary will clarify that paragraph (h), which tracks the language of article 10 (6) of the United Nations Assignment Convention, makes it clear that, the form of transfer of a security right in an asset outside the scope of this law (e.g. an immovable) is left to law other than this law, at least to the extent that the automatic creation and third-party effectiveness of a security right is not impaired. Accordingly, a notarized document and registration may be necessary for the transferee of a mortgage to obtain various rights under immovables law, such as the right to enforce the mortgage. The commentary will further explain that the form

of transfer of a security right in an asset within the scope of this law will be subject to this law.]

Pre-default rights and obligations of the assignor and the assignee

[*Note to the Commission: The Commission may wish to note that the following recommendations, based on articles 11 to 14 of the United Nations Assignment Convention, will be included in the new chapter on pre-default rights and obligations of the parties.*]

Rights and obligations of the assignor and the assignee

16 bis. The law should provide that:

(a) The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein;

(b) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

Representations of the assignor

16 ter. The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:

(i) The assignor has the right to assign the receivable;

(ii) The assignor has not previously assigned the receivable to another assignee; and

(iii) The debtor of the receivable does not and will not have any defences or rights of set-off;

(b) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor of the receivable has, or will have, the ability to pay.

Right to notify the debtor of the receivable

16 quater. The law should provide that:

(a) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor of the receivable notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction; and

(b) Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph (a) of this recommendation is not ineffective for the purposes of recommendation 19 by reason of such breach. However, nothing in this recommendation affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Right to payment

16 quinquiens. The law should provide that:

(a) As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(i) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(ii) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(iii) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable;

(b) The assignee may not retain more than the value of its right in the receivable.

Rights and obligations of the debtor of the receivable and the assignee

Protection of the debtor of the receivable

[*Note to the Commission: The Commission may wish to note that recommendations 17 to 23, which are based on articles 15-21 of the United Nations Assignment Convention, will be placed in a separate chapter dealing with rights and obligations of third-party obligors, along with the recommendations dealing with the rights and obligations of an obligor under a negotiable instrument, a depositary bank, the issuer of a negotiable document and the guarantor/issuer, confirmer or nominated person under an independent undertaking.*]

17. The law should provide that:

(a) Except as otherwise provided in this law, an assignment does not, without the consent of the debtor of the receivable, affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the original contract;

(b) A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(i) The currency of payment specified in the original contract; or

(ii) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Notification of the debtor of the receivable

18. The law should provide that:

(a) Notification of the assignment or a payment instruction is effective when received by the debtor of the receivable if it is in a language that is reasonably expected to inform the debtor of the receivable about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract; and

(b) Notification of the assignment or a payment instruction may relate to receivables arising after notification and that notification of a subsequent assignment constitutes notification of all prior assignments.

Discharge of the debtor of the receivable by payment

19. The law should provide that:

(a) Until the debtor of the receivable receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract;

(b) After the debtor of the receivable receives notification of the assignment, subject to paragraphs (c) to (h) of this recommendation, it is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor of the receivable, in accordance with such payment instruction;

(c) If the debtor of the receivable receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment;

(d) If the debtor of the receivable receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received;

(e) If the debtor of the receivable receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments;

(f) If the debtor of the receivable receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this recommendation as if the debtor of the receivable had not received the notification. If the debtor of the receivable pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid;

(g) If the debtor of the receivable receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor of the receivable is discharged by paying in accordance with this recommendation as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not

limited to any writing emanating from the assignor and indicating that the assignment has taken place;

(h) This recommendation does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Defences and rights of set-off of the debtor of the receivable

20. The law should provide that:

(a) In a claim by the assignee against the debtor of the receivable for payment of the assigned receivable, the debtor of the receivable may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the assignment had not been made and such claim were made by the assignor;

(b) The debtor of the receivable may raise against the assignee any other right of set-off, provided that it was available to the debtor of the receivable at the time notification of the assignment was received by the debtor of the receivable;

(c) Notwithstanding paragraphs (a) and (b) of this recommendation, defences and rights of set-off that the debtor of the receivable may raise pursuant to recommendations 15 (b) and 16 (d) against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor of the receivable against the assignee.

[*Note to the Commission: The Commission may wish to note that, under recommendation 3 (a) (see A/CN.9/WG.VI/WP.26/Add.7), the draft Guide applies to consumers but does affect the rights of consumers under consumer-protection law.*]

Agreement not to raise defences or rights of set-off

21. The law should provide that:

(a) The debtor of the receivable may agree with the assignor in a writing signed by the debtor of the receivable not to raise against the assignee the defences and rights of set-off that it could raise pursuant to recommendation 20. Such an agreement precludes the debtor of the receivable from raising against the assignee those defences and rights of set-off;

(b) The debtor of the receivable may not waive defences:

(i) Arising from fraudulent acts on the part of the assignee; or

(ii) Based on the debtor of the receivable's incapacity;

(c) Such an agreement may be modified only by an agreement in a writing signed by the debtor of the receivable. The effect of such a modification as against the assignee is determined by recommendation 22, paragraph (b).

[*Note to the Commission: The Commission may wish to note that recommendation 21 is based on article 19 of the United Nations Assignment Convention, which refers to a signed writing only for a waiver of defences or its*

modification. If the Commission decides not to refer to signature in recommendation 8 (see A/CN.9/WG.VI/WP.26/Add.7) but rather to evidence that the grantor intended to grant a security right, it may wish to reconsider the reference to signature in recommendation 21. If reference to signature is retained in recommendation 8, an electronic signature should be sufficient (see note after definition (v) ("notification of the assignment") in A/CN.9/WG.VI/WP.27/Add.1.]

Modification of the original contract

22. The law should provide that:

(a) An agreement concluded before notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights;

(b) An agreement concluded after notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is ineffective as against the assignee unless:

(i) The assignee consents to it; or

(ii) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(c) Paragraphs (a) and (b) of this recommendation do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Recovery of payments

23. The law should provide that failure of the assignor to perform the original contract does not entitle the debtor of the receivable to recover from the assignee a sum paid by the debtor of the receivable to the assignor or the assignee.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 23 does not affect any liability of the assignor towards the debtor of the receivable for breach of contract.*]

Third-party effectiveness of a security right in receivables

37. The law should provide that, if a security right in a receivable, negotiable instrument or any other obligation covered as an encumbered asset by this law is effective against third parties, the security right is automatically effective against third parties with respect to any personal or property right that secures payment or performance of the receivable, negotiable instrument or other obligation, without further action by either the grantor or the secured creditor. If the personal or property right is an independent undertaking, a security right in the proceeds under the independent undertaking is automatically effective against third parties (but, as provided in recommendation 16, the security right does not extend to the right to draw under the independent undertaking). This recommendation does not apply to a right in immovable property that under applicable law is transferable separately from a receivable, negotiable instrument or other obligation that it may secure.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that the general third-party effectiveness recommendations*

apply to security rights in receivables, as well as to outright transfers of receivables. The language in parenthesis in the second sentence explains that the security right does not extend to the right to draw. Thus there is no issue of third-party effectiveness in that regard.]

Priority of security rights in receivables

[*Note to the Commission: The Commission may wish to note that the commentary will explain that the general priority recommendations apply to security rights in receivables as well as to outright transfers of receivables.*]

Enforcement of a security right in receivables

Application of this chapter to outright transfers of receivables

88. The law should provide that, with the following exceptions, this chapter does not apply to an outright transfer of receivables:

(a) Recommendation 89 in the case of an outright transfer with recourse; and

(b) Recommendations 102 and 103.

General standard of conduct

89. The law should provide that all parties must exercise their rights and perform their obligations under the recommendations of this chapter in good faith and in a commercially reasonable manner.

Collection of receivables

102. The law should provide that, in the case of an outright transfer of a receivable, the assignee has the right to collect or otherwise enforce the receivable. In the case of a transfer of a receivable by way of security, the assignee is entitled, subject to recommendations 17 to 23, to collect or otherwise enforce the receivable only after default or before default with the agreement of the assignor.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that the secured creditor may, as an alternative to collection, elect to dispose of or retain a receivable pursuant to recommendations 93 (d), (e), 110 and 113 (see A/CN.9/611/Add.2). The commentary will also explain that the assignee may send a notification and a payment instruction even in breach of an agreement with the assignor (see rec. 16 quater above).*]

103. The law should provide that the assignee's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable (such as a guarantee or security right).

[*Note to the Commission: The Commission may wish to note that the commentary will discuss how other recommendations of the chapter on enforcement may apply to the enforcement of a right securing payment of an assigned receivable.*]

Law applicable to security rights in intangible property

137. The law should provide that the creation, the effectiveness against third parties and the priority over the rights of competing claimants of a security right in intangible property are governed by the law of the State in which the grantor is located. [However, with respect to security rights in intangible property that is subject to a title registration system, the law should provide that such issues are governed by the law of the State in which [...].]

137 bis. The law should provide that the law of the State in which the assignor is located governs the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale or lease of, or a security agreement relating to, an immovable over the rights of competing claimants. However, a priority conflict involving the rights of a competing third party registered in the immovables registry of the State in which the immovable is located is governed by the law of that State.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that recommendation 137 bis is designed to address the law applicable to assignments of receivables owing to the grantor under an agreement for the sale or lease of an immovable or under a security agreement over an immovable. In a number of States, it is not possible to create rights in such receivables independently of the related immovable with the result that the effectiveness as between the parties, the third-party effectiveness and the priority of a security right in the receivables is governed by the law (and, in particular, the registry regime) that applies to the related immovable. In other States, it is possible to grant a security right in such receivables independently of the related immovable but the secured creditor is subordinated to third-party rights that are registered against the related immovable in the immovables registry. The second sentence of recommendation 137 bis is designed to preserve the application of the law of the State where the related immovable is located in order to protect third parties who rely on the registration in the immovables registry of that State. Reference is made to rights of a competing third party as the term "competing claimant" is defined by reference to security rights in movables. Reference is also made to "rights" of such parties, since rights of third parties could include not just competing mortgagees but also assignees or buyers of the immovable or the related intangible and indeed any class of third party right for which the immovables regime makes provision for registration. In addition, reference is made to a right "registered in the immovables registry" rather than "that became effective against third parties by registration", since: (i) some immovables registries do not distinguish between inter-parties and third party effectiveness, and (ii) immovables registries do not necessarily require registration for general third-party effectiveness but only for effectiveness against third parties whose rights are also registrable in the immovables registry (e.g. registration may not be needed for effectiveness against an insolvency administrator or a judgement creditor.*]

Law applicable to the rights and obligations of the grantor and the secured creditor

146. The law should provide that the mutual rights and obligations of the grantor and the secured creditor with respect to the security right, whether arising from the security agreement or by law, are governed by the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Law applicable to the rights and obligations of the debtor of the receivable and the assignee, the obligor under a negotiable instrument or the issuer of a negotiable document and the secured creditor

147. The law should provide that the following matters are governed by the law of the State whose law governs an assigned receivable, or a negotiable instrument or a negotiable document in which a security right has been created:

(a) The relationship between an debtor of the receivable and an assignee of the receivable, between an obligor under a negotiable instrument and a creditor with a security right in that instrument or between an issuer of a negotiable document and a creditor with a security right in that document;

(b) The conditions under which the assignment of the receivable, the transfer of the negotiable instrument or the transfer of the negotiable document can be invoked against the debtor of the receivable, the obligor on the negotiable instrument or the issuer of the negotiable document; and

(c) The determination of whether the obligations of the debtor of the receivable, the obligor on the negotiable instrument or the issuer of the negotiable document have been discharged.

[*Note to the Commission: The Commission may wish to note that the commentary will explain that: (i) recommendation 148 applies to the enforcement of a security right in a receivable (A/CN.9/WG.VI/WP.24), and (ii) the recommendations on the impact of insolvency on the law applicable, as well as the other general recommendations in the conflict-of-laws chapter (A/CN.9/WG.VI/WP.24), apply to security rights in receivables.*]